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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LESLIE GOODMAN, Plaintiff and Appellant, v. DARRYL BALLIN et al., Defendants and Respondents.	B212928 (Los Angeles County Super. Ct. No. BC392382)

APPEAL from orders of the Superior Court of Los Angeles County. Edward A. Ferns, Judge. Affirmed.

Law Offices of Clifford B. Scherer and Clifford B. Scherer for Plaintiff and Appellant.

Reback, McAndrews, Kjar, Warford & Stockalper, Robert C. Reback and Lisa M. Schenck for Defendant and Respondent Darryl Ballin.

Gershuni & Goldstein and Neal M. Goldstein for Defendants and Respondents Sharon Kianfar and Law and Mediation Offices of Heidi S. Tuffias, Inc.

* * * * * *

Plaintiff and appellant Leslie Goodman appeals from an order granting a special motion to strike a cause of action under the "anti-SLAPP statute" (Code Civ. Proc., § 425.16)[1] brought by defendant and respondent Darryl Ballin, M.D. (Dr. Ballin), and from a dismissal following an order sustaining a demurrer with leave to amend to a separate cause of action brought against defendants and respondents Sharon Kianfar (Kianfar) and the Law and Mediation Offices of Heidi S. Tuffias, Inc. (Tuffias). We affirm. In connection with the motion to strike, the trial court properly ruled that the first cause of action alleged protected activity and appellant failed to demonstrate a probability of prevailing. The trial court also properly sustained the demurrer as to the second cause of action on the ground that res judicata barred the claim.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2008, appellant filed a complaint alleging two causes of action—the first for invasion of privacy and wrongful disclosure of medical records against Dr. Ballin, and the second for invasion of privacy, wrongful disclosure of medical records and intentional infliction of emotional distress against Kianfar and Tuffias. According to the complaint, Tuffias, through employee Kianfar, was the attorney representing appellant's ex-husband Steven Ballenberg (Ballenberg) in a child custody dispute, Superior Court of Los Angeles County case No. BD395980.

Prior to the initiation of that action in 2006, Dr. Ballin was appellant's personal physician. In the course of the child custody litigation, Kianfar served Dr. Ballin with a subpoena duces tecum seeking the production of appellant's medical records. The first page of the subpoena stated: "'Do not release the requested records to the deposition officer prior to the date and time stated above," which was August 16, 2006. In connection with the subpoena, a special notice to consumer was also served in accordance with sections 1985.3 and 1987.1, statutes affording a consumer an

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[1] SLAPP is an acronym for strategic lawsuits against public participation. Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

opportunity to object and to move to quash or limit the subpoena before the records are produced. On August 8, 2006, before expiration of the time permitting appellant to object to production, Dr. Ballin released and delivered the medical records to Kianfar. The complaint further alleged: "As a direct and proximate result of DR. BALLIN's release, delivery, dissemination and disclosure of her personal, private and sensitive medical information, Plaintiff worried, feared, suspected and became concerned and aware that the information was being read, disseminated, broadcast and digested by persons who would not be entitled to the information without her express permission." In the first cause of action, appellant sought damages for the severe physical, mental and emotional distress she suffered as a result of Dr. Ballin's conduct.

According to the second cause of action, upon receipt of the medical records from Dr. Ballin, "KIANFAR, read the privileged documents in their entirety, did not notify opposing counsel, did not return the document[s] to DR. BALLIN and, instead, wrongfully disseminated the privileged medical information to experts, to the court and others for the purpose of taking unfair advantage in processing of the custody dispute." The complaint further alleged that Kianfar's conduct was with the knowledge and consent of Tuffias. Appellant sought damages for the physical, mental and emotional distress she suffered as a result of Kianfar's conduct. She also sought punitive damages, alleging that Kianfar's and Tuffias's conduct was outrageous, intentional and done with malice and reckless disregard.

Dr. Ballin responded to the complaint by filing a special motion to strike pursuant to section 425.16, asserting that his production of the medical records was a protected communication in a judicial proceeding. Appellant opposed the motion and, in support of her opposition, submitted a declaration from counsel which reiterated the allegations of her complaint. By minute order dated October 17, 2008, the trial court granted the motion, ruling that Dr. Ballin met his threshold burden to show the cause of action fell within the protections of section 425.16 and that appellant failed to establish a probability of prevailing. The trial court specifically rejected appellant's contention that Dr. Ballin's conduct violated Civil Code section 56.10, which provides that a physician is prohibited

from disclosing a patient's medical records without the patient's permission, unless the disclosure is compelled for specified reasons, including receipt of a subpoena duces tecum. The trial court ruled that Civil Code section 56.10 provided protection for those who in good faith, albeit imperfectly, attempt to comply with a subpoena. It further ruled that there was nothing in the language of Civil Code section 56.10 that indicated any intent to deprive compelled physicians of their rights under Civil Code section 47, subdivision (b).

Kianfar and Tuffias demurred on two independent grounds. First, they asserted that the second cause of action was barred by the litigation privilege, Civil Code section 47, subdivision (b). Second, they argued that res judicata barred the claim, as the same issue was resolved through a dismissal with prejudice of an order to show cause previously filed by appellant. By minute order dated September 17, 2008, the trial court sustained the demurrer, with leave to amend, on both grounds. It determined that the cause of action against Kianfar and Tuffias was based on communicative conduct concerning the lawsuit and ruled that "[c]ommunications concerning the lawsuit fall under the protection of the litigation privilege." It further ruled that the cause of action was barred by res judicata, "as the court in BD 395980 entered an order based upon the parties' stipulation providing that plaintiff in this action dismissed the Order to Show Cause 'as to Petitioner and Petitioner's counsel'" and thus any rights she retained against third parties did not include counsel Kianfar and Tuffias.

After appellant failed to file an amended complaint within the time provided by the trial court, Kianfar and Tuffias moved to dismiss the complaint. Receiving no opposition, the trial court granted the motion.

Thereafter, appellant filed a single notice of appeal from the order granting the motion to strike and a judgment of dismissal. As in *Coast Plaza Doctors Hospital v. UHP Healthcare* (2002) 105 Cal.App.4th 693, 699, appellant filed a notice of appeal from the order of dismissal and there is no indication that a judgment of dismissal was entered. "We agree with the observation of the court in *Smith v. Hopland Band of Pomo Indians* (2002) 95 Cal.App.4th 1, 3, footnote 1, to the effect that it fails 'to understand

why the clearly established law on this point continues to be disregarded, in the interest of judicial economy, we shall deem the order to incorporate a judgment of dismissal.' Nevertheless, we follow common practice in deeming the appeal to be from a judgment." (*Coast Plaza Doctors Hospital v. UHP Healthcare, supra,* at p. 699.)

DISCUSSION

Appellant contends the trial court erred both in granting the motion to strike and in sustaining the demurrer. She asserts that the conduct alleged in the complaint was neither protected activity under section 425.16 nor a privileged publication under Civil Code section 47, subdivision (b). She further urges that res judicata did not bar her complaint because she expressly reserved her right to proceed against Kianfar and Tuffias. We find no error, as the trial court properly rejected each of these arguments in making its rulings.

I. The Trial Court Properly Granted Dr. Ballin's Motion to Strike.

A. The Anti-SLAPP Statute and the Standard of Review.

Section 425.16, the anti-SLAPP statute, is aimed at curbing "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a); *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 738–739.) The statute provides in relevant part: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) An act "in furtherance of" the right to petition includes "any written or oral statement or writing made before a . . . judicial proceeding"; "any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body . . . ."; and any "conduct in furtherance of the exercise of the constitutional right of petition . . . ." (§ 425.16, subd. (e)(1), (2), (4).)

There are two components to a motion to strike brought pursuant to section 425.16. Initially, the party challenging the lawsuit has the threshold burden to show that the cause of action arises from an act in furtherance of the right of petition or free speech. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965; *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Once that burden is met, the burden shifts to the complaining party to demonstrate a probability of prevailing on the claim. (*Zamos v. Stroud, supra*, at p. 965; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) To satisfy the latter prong, the plaintiff "'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821; see also *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568 [to establish a probability of prevailing, a plaintiff must substantiate each element of the alleged cause of action through competent, admissible evidence].) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

We independently review the record to determine both whether the asserted cause of action arises from the defendant's free speech or petition activity, and, if so, whether the plaintiff has shown a probability of prevailing. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3; *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

B. The Complaint Alleged Protected Activity.

The court in *Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467 recently summarized what a party bringing a special motion to strike must show to meet its threshold burden, explaining, "'the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity.' [Citation.] '"The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—

and whether that activity constitutes protected speech or petitioning." [Citation.]' [Citation.] Section 425.16 defines an '"act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue,"' to include statements or writings before a judicial proceeding, or any other official proceeding authorized by law and statements or writings made in connection with an issue under consideration or review by a judicial body. [Citations.] 'Thus, statements, writings and pleadings in connection with civil litigation are covered by the anti-SLAPP statute, and that statute does not require any showing that the litigated matter concerns a matter of public interest. [Citations.]' [Citation.]" (*Id.* at p. 1478.)

"In deciding whether the initial 'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (b).)" (*Navellier v. Sletten, supra,* 29 Cal.4th at p. 89.) We agree with the trial court that Dr. Ballin met his threshold burden; "the complaint falls squarely within the scope of CCP § 425.16(e)(4)" because Dr. Ballin's conduct "was 'in furtherance of the exercise' of the parties in [case No.] BD395980's 'constitutional right of petition.'" Responding to a subpoena is an act of protected speech under section 425.16, subdivision (e)(4). (*Greka Integrated, Inc. v. Lowrey* (2005) 133 Cal.App.4th 1572, 1580 ["Lowrey disclosed information about Greka to his counsel, to authorities and in deposition and trial testimony in response to subpoenas. These are all protected activities"].)

We reject appellant's assertion that Dr. Ballin's conduct was not protected because his production of the medical records preceded the date indicated on the subpoena and, thus, was not made in connection with a judicial proceeding. The declaration that appellant submitted in opposition to the motion to strike confirmed that Dr. Ballin produced the records in response to the subpoena, stating: "DR. BALLIN released and delivered the medical records to the deposition officer who immediately delivered them to Defendant's attorney, KIANFAR." That the production of the records may not have been in complete conformance with the subpoena's instructions does not remove the activity from the ambit of section 425.16. (See *Blanchard v. DIRECTV, Inc.* (2004) 123

Cal.App.4th 903, 921 [“‘communications made in connection with litigation do not necessarily fall outside the privilege merely because they are, or are alleged to be, fraudulent, perjurious, unethical, or even illegal’ assuming they are logically related to litigation”].)

C. Appellant Failed to Establish a Probability of Prevailing.

Given our conclusion that Dr. Ballin met his burden of showing that the cause of action for invasion of privacy arose from protected activity, we turn to the second step of the inquiry and ask whether appellant demonstrated a probability of prevailing on the claim. (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra,* 29 Cal.4th at p. 67.) The trial court ruled that appellant failed to demonstrate any probability of prevailing because the cause of action alleged conduct protected by California’s litigation privilege. (See *Feldman v. 1100 Park Lane Associates, supra,* 160 Cal.App.4th at p. 1485 [“The litigation privilege is ‘relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing’”].) We agree with the trial court’s conclusion.

Civil Code section 47, subdivision (b) defines a “privileged publication” as including one made “[i]n any . . . judicial proceeding . . . .” “[T]he privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have [*sic*] some connection or logical relation to the action.” (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) “The purposes of section 47, subdivision (b), are to afford litigants and witnesses free access to the courts without fear of being harassed subsequently by derivative tort actions, to encourage open channels of communication and zealous advocacy, to promote complete and truthful testimony, to give finality to judgments, and to avoid unending litigation.” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1063; accord, *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 955.) “To further these purposes, the privilege has been broadly applied. It is absolute and applies regardless of malice. [Citations.]” (*Jacob B. v. County of Shasta, supra,* at p. 955.) “Although originally enacted with reference to defamation actions alone [citation], the

privilege has been extended to *any* communication, whether or not it is a publication, and to *all* torts other than malicious prosecution. [Citations.]" (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 29.) The privilege applies "even though the publication is made outside the courtroom and no function of the court or its officers is involved." (*Silberg v. Anderson, supra,* at p. 212.) Moreover, "the privilege does extend to causes of action based on the constitutional right to privacy." (*Jacob B. v. County of Shasta, supra*, at p. 952.)

The alleged conduct supporting appellant's cause of action against Dr. Ballin was a privileged publication. We are guided by *Foothill Federal Credit Union v. Superior Court* (2007) 155 Cal.App.4th 632 (*Foothill*). There, the plaintiffs alleged claims for invasion of privacy and intentional infliction of emotional distress against defendant Foothill Federal Credit Union (FFCU) on the ground that FFCU's production of consumer records in response to a subpoena included personal financial records that had been expressly removed from the scope of the subpoena. (*Id*. at pp. 634–635.) In issuing a peremptory writ of mandate directing the trial court to sustain a demurrer to the two causes of action, the court reasoned that the elements necessary for application of the litigation privilege were met. First, the disclosure of the records was a communication made in the course of judicial proceedings, as "in the context of the pending litigation, the counsel of record for a party issued a subpoena duces tecum requiring FFCU to produce documents." (*Id.* at p. 635.) Second, "FFCU was a participant authorized by law, as it was brought into the proceedings by the issuance of the subpoena ordering it to produce the specified documents. [Citation.]" (*Id*. at pp. 635–636.) Third, responding to the subpoena was a communication made to achieve the objects of the litigation, given that "[t]he documents were produced to provide the party who subpoenaed them with potential evidence in the litigation." (*Id*. at p. 636.) Finally, the subpoenaed records bore some relation to the action, as they were sought as part of a probate proceeding to support an allegation of elder financial abuse. (*Ibid.*)

Importantly, the court rejected one of appellant's arguments here, which is that Dr. Ballin was not a "participant authorized by law" because his production preceded

expiration of the time limits afforded by section 1985.3. (See *Foothill, supra,* 155 Cal.App.4th at p. 636 [real parties argued "the purposes of the litigation privilege are not served by granting immunity under the privilege to a custodian of records who discloses them in a manner not compliant with section 1985.3"].) Section 1985.3 "requires that consumers be informed when certain personal records have been subpoenaed, and it offers them the opportunity to challenge that subpoena before the documents sought are produced." (*Foothill, supra,* at p. 639.) Explaining that "[s]ection 1985.3 offers a consumer a 'statutory procedural mechanism for enforcing his or her right to privacy,'" the court found that the statute neither made the custodian of records a guarantor of the consumer's privacy nor created a private right of action against the custodian for violation of the section. (*Ibid.*) Thus, the court reasoned that "[s]ection 1985.3 does not prescribe or proscribe conduct by the recipient of the subpoena, and it does not remotely establish that erroneously broad disclosure of documents is actionable." (*Ibid.*) Accordingly, it ruled that application of the litigation privilege to bar an action based on the alleged improper disclosure of confidential records did not violate the purpose and effect of section 1985.3. (*Foothill, supra,* at pp. 641–642.) "Contrary to real parties in interest's claim, it does not frustrate the purpose of section 1985.3 to apply the litigation privilege to suits against custodians of records because section 1985.3 neither contemplates nor provides recourse for a consumer against those custodians." (*Id.* at p. 642.)

We likewise reject appellant's alternative argument that the litigation privilege did not apply to bar her cause of action because she alleged a violation of Civil Code section 56.10 (section 56.10). According to subdivision (a) of that provision, "No provider of health care, health care service plan, or contractor shall disclose medical information regarding a patient of the provider . . . without first obtaining an authorization, except as provided in subdivision (b) or (c)." (Civ. Code, § 56.10, subd. (a).) Pertinent here, the exception outlined in subdivision (b)(3) provides: "(b) A provider of health care, a health care service plan, or a contractor shall disclose medical information if the disclosure is compelled by any of the following: [¶] . . . [¶] (3) By a

party to a proceeding before a court or administrative agency pursuant to a subpoena, subpoena duces tecum, notice to appear served pursuant to Section 1987 of the Code of Civil Procedure, or any provision authorizing discovery in a proceeding before a court or administrative agency." (Civ. Code, § 56.10, subd. (b)(3).) A patient whose medical records are disclosed in violation of section 56.10 may bring an action against the person who or entity that negligently released the records. (Civ. Code, §§ 56.35 & 56.36, subd. (b).)

The trial court rejected appellant's argument, renewed on appeal, that the exception afforded by section 56.10, subdivision (b)(3) was inapplicable because Dr. Ballin's premature disclosure of the records was not "pursuant to" a subpoena. The trial court reasoned: "[Civil Code section 56.10] does not distinguish in its terms between those who make mistakes, and those who do not. Any person who responds to a subpoena is always at risk of misinterpreting its scope or other matters. For instance, a subpoena could request documents relevant to a matter, and that matter might be arguably related to another matter. The recipient of the subpoena might too broadly interpret the language in the subpoena and produce documents which were not meant to be the subject of the subpoena." The trial court further considered that nothing in the language of section 56.10 indicated the Legislature intended to deprive those who commit some mistake in responding to a subpoena from the exception contained in subdivision (b)(3), and, correspondingly, from the protections to the litigation privilege in Civil Code section 47, subdivision (b). Accordingly, the trial court concluded that Dr. Ballin's failure strictly to comply with the subpoena did not render his conduct punishable under section 56.10.

The trial court's reasoning is analogous to that in *Jacob B. v. County of Shasta, supra,* 40 Cal.4th at pages 958 to 959, where the court explained that case law establishing the litigation privilege extends to communications permitted by law or to participants authorized by law does not mean that the communications must be accurate or truthful. For example, "[o]ne may readily acknowledge that perjured testimony is not permitted, but the privilege extends even to such testimony because testimony in general

is permitted by law. Another example is found in *Rusheen v. Cohen, supra,* 37 Cal.4th 1048, where we held that the privilege extends to 'filing allegedly false declarations of service to obtain a default judgment . . . .' (*Id.* at p. 1052.) Obviously, the law does not permit false declarations, but declarations of service to obtain a default judgment are a category of publication permitted by law. Hence, the litigation privilege protects all such declarations." (*Jacob B. v. County of Shasta, supra*, at p. 959.) By the same token, the court in *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 920, explained that the litigation privilege extends to false or fraudulent communications so long as the communications are logically related to the litigation. "'[T]he "connection or logical relation" which a communication must bear to litigation in order for the privilege to apply, is a *functional* connection. That is to say, the *communicative* act . . . must function as a necessary or useful step in the litigation process and must serve its purposes. This is a very different thing from saying that the communication's *content* need only be related in some way to the subject matter of the litigation . . . .' [Citation.]" (*Ibid.*)

Here, while the timing of Dr. Ballin's production of appellant's medical records may not have been permitted by the subpoena, there was no evidence submitted in connection with the motion to strike that suggested his production was not in response to the subpoena. Indeed, the declaration submitted by appellant expressly provided that Dr. Ballin delivered the records directly to the deposition officer, who in turn provided them to Kianfar. Under these circumstances, Dr. Ballin's release and delivery of the medical records constituted a communicative act functioning as a step in the litigation process. The trial court properly ruled that appellant's cause of action premised on such an act was barred by the litigation privilege and, accordingly, properly determined that appellant failed to establish a probability of prevailing sufficient to defeat the motion to strike.

II. The Trial Court Properly Sustained the Demurrer.

By way of demurrer, Kianfar and Tuffias also successfully urged that the litigation privilege barred appellant's claim against them for invasion of privacy, wrongful

disclosure of confidential medical information and intentional infliction of emotional distress. The trial court ruled that appellant's cause of action was based on communicative conduct concerning the lawsuit and that any such communication falls under the protection of the litigation privilege codified in Civil Code section 47, subdivision (b). It also sustained the demurrer on the independent ground that res judicata barred appellant's claim.

A demurrer tests the sufficiency of the plaintiff's claims as a matter of law. (*Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 43–44.) We review de novo the ruling on the demurrer, exercising our independent judgment to determine whether a cause of action has been stated. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300; *Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.) We accept as true the properly pleaded allegations of facts in the complaint, but not the contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "We do not, however, assume the truth of the legal contentions, deductions or conclusions; questions of law, such as the interpretation of a statute, are reviewed de novo." (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 373.) If no liability exists as a matter of law, we must affirm the judgment. (*Traders Sports, Inc. v. City of San Leandro, supra,* at pp. 43–44.) Appellant bears the burden of proving the trial court erred in sustaining the demurrer. (*Blank v. Kirwan, supra*, at p. 318; *Coutin v.* Lucas (1990) 220 Cal.App.3d 1016, 1020.)[2]

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[2] We typically apply the abuse of discretion standard in reviewing the trial court's denial of leave to amend. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318; *Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497–1498.) Here, however, appellant was granted leave to amend, but failed to do so within the time permitted by the court. Consequently, the trial court dismissed the complaint. Because appellant has not suggested on appeal how she might amend her complaint to state a valid cause of action, we will consider only the cause of action against Kianfar and Tuffias as pled. (See *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 44 ["The burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will rewrite a complaint"].)

We conclude the trial court correctly sustained the demurrer on res judicata grounds. In her second cause of action, appellant alleged that while Kianfar should have refrained from reading appellant's medical records upon receipt in August 2006 and should have returned them to opposing counsel, "KIANFAR, read the privileged documents in their entirety, did not notify opposing counsel, did not return the document[s] to Dr. BALLIN and, instead, wrongfully disseminated the privileged medical information to experts, to the court and others for the purpose of taking unfair advantage in processing of the custody dispute." Appellant further alleged that she suffered damages "[a]s a direct and proximate result and consequence of the dissemination and disclosure" of her private medical records.

In connection with the demurrer, the trial court took judicial notice of a March 15, 2007 stipulation and order modifying the prior judgment between Ballenberg and appellant. In part, the order resolved an order to show cause filed by appellant on August 11, 2006, "based on the improper and untimely production of [appellant's] medical records from Dr. Darryl Ballin to [Ballenberg] and the Court . . . ." The order provided: "[Appellant] shall dismiss her Order to Show Cause, with prejudice, as to Petitioner and Petitioner's counsel, for any and all occurrences which took place up to [] and including December 31, 2006, and [appellant] shall have the right to obtain the Court's copy of Dr. Ballin's records after April 1, 2008, provided that neither party elects the limited 730 Evaluation by April 1, 2008." After further addressing the limited manner in which appellant's medical records could be utilized, the order further provided that it "shall not be deemed a waiver of any rights [appellant] may otherwise have to proceed against any third person or entity with regard to the impropriety of Dr. Ballin's release of [her] medical records."

Res judicata principles "preserve the integrity of the judicial system, promote judicial economy, and protect litigants from harassment by vexatious litigation." (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 829.) The doctrine of res judicata precludes parties or their privies from relitigating the same cause of action finally resolved in a prior proceeding. (*Id.* at p. 828.) To apply the doctrine, (1) the cause of

action raised in the present proceeding must be the same as the cause of action in the prior proceeding; (2) the prior proceeding must have resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted must have been a party or in privity with a party to the prior proceeding. (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 531; *Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 556.)

These elements were satisfied here. For res judicata purposes, the identity of a cause of action is determined under the primary rights theory. As explained in *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795, the invasion of one primary right gives rise to a single cause of action and, thus, "[e]ven where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." Here, the order to show cause filed by appellant sought redress for the improper production of appellant's medical records, while the cause of action against Kianfar and Tuffias was based on their wrongful disclosure and dissemination of appellant's medical records. These claims gave rise to a single cause of action. In *Takahashi v. Board of Education* (1988) 202 Cal.App.3d 1464, 1474 to 1476, the court determined that a complaint alleging civil rights and other constitutional violations stemming from the plaintiff's termination involved the same primary right alleged in a prior action challenging whether the termination complied with applicable statutory procedures. The court stated: "All of plaintiff's alleged causes of action in this consolidated action arise in conjunction with or as a result of the alleged wrongful termination of her employment. Indeed, plaintiff specifically alleges that each act complained of caused the dismissal (wrongful discharge, conspiracy, unconstitutional discharge, discharge in violation of state civil rights) or was a consequence of the termination (emotional distress, damages), part and parcel of the violation of the single primary right, the single harm suffered. [Citation.] Plaintiff's allegations of consequential injuries are not based upon infringement of a separate primary right." (*Id*. at p. 1476.)

Here, too, appellant's claim in the order to show cause and cause of action in the complaint against Kianfar and Tuffias involved the same primary right, as they arose in

conjunction with or were the result of the wrongful disclosure of her medical records. It is of no consequence that appellant may not have raised all available legal theories in connection with the order to show cause, such as her claim for intentional infliction of emotional distress, as res judicata applies to claims that were or could have been raised in a prior action. "'. . . If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. . . . The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable. [Citations.]' [Citation.]" (*Tensor Group v. City of Glendale* (1993) 14 Cal.App.4th 154, 160.)

With respect to the second element, a dismissal with prejudice—called a retraxit at common law—is deemed to be a judgment on the merits against the plaintiff, which bars a subsequent action on the same cause of action. (*Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America* (2005) 133 Cal.App.4th 1319, 1330; accord, *Long Beach Grand Prix Assn. v. Hunt* (1994) 25 Cal.App.4th 1195, 1197 ["a dismissal with prejudice is equivalent, for purposes of res judicata, to a judgment on the merits in favor of the defendant who is dismissed"]; *Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 820 ["Dismissal with prejudice is determinative of the issues in the action and precludes the dismissing party from litigating those issues again"].) Appellant's dismissal with prejudice of the order to show cause was the equivalent of a judgment on the merits. (See *Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America*, *supra*, at pp. 1333–1334 [dismissal with prejudice as part of a settlement agreement was a retraxit barring a subsequent suit raising the same issues].)

Finally, the same parties were involved in the dismissal and the complaint. Indeed, appellant's only meaningful challenge to the application of the doctrine of res judicata is that Kianfar and Tuffias were third parties against whom she reserved her

rights as they were excluded from the dismissal. But as the trial court pointed out, the dismissal with prejudice was expressly directed to "Petitioner and Petitioner's counsel . . . ." Accordingly, Kianfar and Tuffias, as Ballenberg's attorney and law firm, were parties to the dismissal.

Because the trial court properly sustained the demurrer on the ground that res judicata barred appellant's claim, we need not address Kianfar and Tuffias's alternative argument regarding application of the litigation privilege.

DISPOSITION

The orders granting the motion to strike and dismissing the complaint are affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ